A **PICCOLO MONDO GASTRO SDN BHD**

**v.**

**ABSOLUTE PRESTIGE SDN BHD**

B HIGH COURT MALAYA, KUALA LUMPUR
VAZEER ALAM MYDIN MEERA JC
[CIVIL SUIT NO: 22NCVC-288-2011]
23 SEPTEMBER 2013

C ***TORT:*** *Trespass to land - Unlawful occupier - Damages - Claim for - Assessment of - Whether defendant used premises for monetary gain - Application of "user principle" - Whether defendant obliged to pay reasonable market rent for use of premises*

D ***TORT:*** *Trespass to land - Unlawful occupier - Dispute between parties as to area being trespassed - Whether trespassed area 410 sq ft and not 173 sq ft as claimed by defendant - Whether defendant's valuation report not accurate depiction of trespassed area - Findings of Senior Asssistant Registrar - Whether unimpeachable*

E ***CIVIL PROCEDURE:*** *Damages - Assessment of - Measure of damages - Trespass to land - Unlawful occupier - Whether defendant used premises for monetary gain - Application of "user principle" - Whether defendant obliged to pay reasonable market rent for use of premises*

F The defendant had occupied several lots of the Side Walk Cafe at Jalan Bukit Bintang, Kuala Lumpur, which the plaintiff had rented from Dewan Bandaraya Kuala Lumpur ('DBKL'), the landlord. The defendant had carried on its business at the area known as the Juice Bar. The plaintiff claimed that the defendant's G use of the property was a trespass on its premises. On 22 March 2013, the Senior Assistant Registrar delivered her decision in respect of the assessment of damages for trespass to the said premises (i) the period of trespass was from 1 August 2010 to 17 August 2010 ('item a'); (ii) the area of the premises of the H Juice Bar trespassed by the defendant was 410 sq. ft ('item b') and (iii) the damages were calculated at the rate of rental for the premises at RM4 per sq ft ('item c'). The plaintiff was dissatisfied with item (c) and appealed to the judge in chambers *vide* encl. 63. The defendant, however, was dissatisfied with item (b) and I appealed to the judge in chambers *vide* encl. 64.

**Held (allowing encl. 63; dismissing encl. 64 with costs):**

**(1)** There was uncontroverted evidence that the defendant had used the premises to carry out its own business from 1 August 2010 to 17 August 2012. During this period, the plaintiff had been deprived of the use of the premises. Clearly, the defendant had used the premises for monetary gain. The benefit that the defendant had derived from the trespass was that it had not paid any rental at all for the use of the premises. Had it rented the premises from the plaintiff to carry out its business, then it would have had to pay market rental rates and not the rate that the plaintiff paid DBKL. Therefore, this was a clear case for the application of the "user principle" and the defendant was obliged to pay reasonable market rent for the use of the premises. The contention that the rental rate should be RM4 per sq ft could not stand for the "measure of damages was not what the plaintiffs had lost, but what benefit the defendant had obtained by having use" of the property. (para 8)

**(1a)** The market rental rate for the premises would be a fair measure of compensation payable to the plaintiff. The market rentals ascribed in the plaintiff's valuation report ("PVR") were more reflective of the market rentals for the period of assessment, 1 August 2010 to 17 august 2012. The reasonable market rental for the purposes of calculating damages would be RM42 per sq ft for the first term and RM50 for the second term. Based on the above, the total amount would be RM463,220.65. The Senior Assistant Registrar had erred in applying the rate of RM4 per sq ft as the same was against established principles. Therefore, the appeal in encl. 63 was allowed. (para 15)

**(2)** There was a dispute between parties as to the floor area of the Juice Bar. The plaintiff submitted that the area was 410 sq ft, whilst the defendant submitted that it was 173 sq ft. However, a careful perusal of the site plan in the defendant's valuation report showed that the area demarcated therein was only a portion of the trespassed area and not the whole, and as such it was not an accurate depiction of the trespassed area. The Senior Assistant

A Registrar made a finding of fact that the floor area of the Juice Bar was 410 sq ft. Based on the evidence adduced, that finding of fact by the Senior Assistant Registrar was unimpeachable. Thus, encl. 64 was dismissed. (para 17)

B *[Orders accordingly.]*

**Case(s) referred to:**

*Alfred Templeton & Ors v. Mount Pleasure Corp Sdn Bhd [1989] 1 CLJ 693; [1989] 1 CLJ (Rep) 219 HC* ***(refd)***

*Inverugie Investments Ltd v. Hackett [1995] 3 All ER 841* ***(refd)***

C *Penarth Dock Engineering Co Ltd v. Pounds [1963] 1 Lloyd's Rep 359* ***(refd)***

*Subramaniam Paramasivam & Ors v. Malaysian Airline System Bhd [2002] 1 CLJ 230 HC* ***(refd)***

*Swordheath Properties Ltd v. Tabet [1979] 1 All ER 240* ***(refd)***

D *For the plaintiff - Tan Kah Hooi; M/s Tan, Chua & Lawrence*
*For the defendant - SM Shanmugam (Cheryl Denise Thean with him); M/s Lee Hishammuddin Allen & Gledhill*

*Reported by Suhainah Wahiduddin*

E

## JUDGMENT

**Vazeer Alam Mydin Meera JC:**

F **[1]** These are my grounds in respect of my decision on encls. 63 and 64, both of which are part appeals to judge in chambers against the order of the learned Senior Assistant Registrar dated 22 March 2013.

G **[2]** The facts are as follows. By judgment dated 9 December 2011, I had ordered that the defendant pay the plaintiff damages to be assessed for trespass to premises known as the "Juice Bar". The "Juice Bar" occupied one of several lots at the Side Walk Café at Jalan Bukit Bintang, Kuala Lumpur, which the plaintiff had H rented from Dewan Bandaraya Kuala Lumpur ("DBKL"), the landlord. The defendant had carried on business at the Juice Bar.

**[3]** On 22 March 2013, the learned Senior Assistant Registrar delivered her decision in respect of assessment of damages. In I summary her findings were that:

(a) the period of trespass is from 1 August 2010 to 17 August 2012 (ie, 24 months and 16 days); A

(b) the area of the premises of the 'Juice Bar' trespassed by the defendant is 410 sq ft; and

(c) the damages were calculated at the rate of rental for the premises at RM4 per sq ft. B

**[4]** The plaintiff being dissatisfied with item 3(c) above has appealed to judge in chamber *vide* encl. 63. Whilst the defendant being dissatisfied with item 3(b) above has appealed to judge in C chambers *vide* encl. 64. I heard both enclosures together. Having found merit in the plaintiff's appeal in encl. 63, allowed the appeal with cost of RM5,000. And in respect of encl. 64, I found that the learned Senior Assistant Registrar had applied the correct principles in determining the area of premises trespassed and as D such I dismissed encl. 64 with cost of RM5,000. The defendant being dissatisfied with my decision in respect of both encls. 63 and 64 has appealed to the Court of Appeal. My reasons for the decision are as follows.

E

## Enclosure 63

**[5]** The law in respect of assessment of damages has been well set out by Kang Hwee Gee J in *Subramaniam Paramasivam & Ors v. Malaysian Airline System Bhd* [2002] 1 CLJ 230 in the following F terms:

> In attempting to measure the damages that may be awarded to the plaintiffs two basic principles of assessment must first be understood.
>
> The first is with respect to its function. As Lord Blackburn said in *Livingstone v. Rawyard Coal Co.* [1880] 5 App. Cas 25 at 39, damages is: G
>
> > that sum of money which will put the party who has been injured, or who has suffered in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation. H
>
> The second is a corollary of the first - that in awarding damages, the plaintiff should not be allowed to profit by it. The principle is enunciated in the Federal Court case of *Tan Sri Khoo Teck Puat v. Plenitute Holdings Sdn Bhd* [1994] 3 MLJ 777 wherein Edgar Joseph Jr FJ speaking for the panel said at p. 788: I

> It goes without saying that the effect of allowing the plaintiff's claim is to put him in a better position than he would have been if there had been no breach, then this would be contrary to the principles enunciated above.

In proposing this principle the Federal Court relied on the English Court of Appeal case of *C & P Haulage v. Middleron* [1983] 3 All ER 94 wherein Ackner LJ said at 98-100:

> It is not the function of the court where there is a breach of contract knowingly, as this would be the case, to put a plaintiff in a better financial position than if the contract had been properly performed.
>
> ...
>
> There is yet another principle one must be acquainted with - that a claimant must prove his loss. As Lord Goddard said in *Bonham-Carter v. Hyde Park Hotel Ltd* 64 TLR 177 at 178 and adopted applied in *John v. Dharmaratnam* [1962] MLJ 187 and more recently in *Tan Sri Khoo Teck Puat* (*supra*):
>
> ... plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars, so to speak, throw them at the head of the court, saying: 'This is what I have lost, I ask you to give me these damages.' They have to prove it.

**[6]** Now, that is the broad principles of law as regards assessment of damages. In respect of trespass, where the trespass amounts to the use of the property by the defendant, the normal measure of damages is the ordinary letting value of the property. The authority for that proposition is found in *Swordheath Properties Ltd v. Tabet* [1979] 1 All ER 240 where Megaw LJ held:

> There is indeed, curiously, no authority which directly deals with this question in relation to trespass on residential property. But counsel for the plaintiffs has referred us to a passage in *Halsbury's Laws of England* where the authors of the title Damages say:
>
> *12 Halsbury's Laws* (4th Edn) para 1170
>
> Where the defendant has by trespass made use of the plaintiff's land, the plaintiff is entitled to receive by way of damages such sum as should reasonably be paid for the use. It is immaterial that the plaintiff was not in fact thereby impeded or prevented from himself using his own land either because he did not wish to do so or for any other reason.

> Then in a footnote various authorities are cited in support of that passage in the text. The first authority cited is *Whitwham v. Westminster Brymbo Coal and Coke Co*. That is a case which was decided by a Court of Appeal consisting of Lindley, Lopes and Rigby LJJ. It appears to me that the judgments, at any rate, of Lindley and Rigby LJJ fully support the proposition which is set out in *Halsbury* in the passage which I have read.
>
> If further authority were needed, counsel for the plaintiffs has referred us to a decision of Lord Denning MR (sitting as an additional judge of the Queen's Bench Division) in *Penarth Dock Engineering Co Ltd v. Pounds*. In his decision in that case, so far as the question of damages arose, Lord Denning MR had no hesitation in saying that the plaintiffs, even though they would not themselves have made use, bringing in financial return, of the dock in respect of which the trespass was committed, were nevertheless entitled to damages for that trespass, calculated by reference to the proper value to the trespassers of the use of the property on which they had trespassed, for the period during which they had trespassed.
>
> It appears to me to be clear, both as a matter of principle and of authority, that in a case of this sort the plaintiff, when he has established that the defendant has remained on as a trespasser in residential property, is entitled, without bringing evidence that he could or would have let the property to someone else in the absence of the trespassing defendant, to have as damages for the trespass the value of the property as it would fairly be calculated; and, in the absence of anything special in the particular case it would be the ordinary letting value of the property that would determine the amount of damages.

**[7]** The principle enunciated in *Penarth Dock Engineering Co Ltd v. Pounds* [1963] 1 Lloyd's Rep 359 by Lord Denning MR is that the "measure of damages was not what the plaintiffs had lost, but what benefit the defendant had obtained by having use" of the property. This principle was adopted and applied by Edgar Joseph Jr J (later FCJ) in *Alfred Templeton & Ors v. Mount Pleasure Corp Sdn Bhd* [1989] 1 CLJ 693; [1989] 1 CLJ (Rep) 219 at pp. 261-262 in the assessment of damages for trespass to land. The *Penarth Dock*'s principle now termed as the "user principle" was reaffirmed by the Privy Council in *Inverugie Investments Ltd v. Hackett* [1995] 3 All ER 841 by Lord Lloyd of Berwick as follows:

A In *Stoke-on-Trent City Council v. W & J Wass Ltd* [1988] 3 All ER 394 at 402, [1988] 1 WLR 1406 at 1416 Nicholls LJ called the underlying principle in these cases the 'user principle'. The plaintiff may not have suffered any actual loss by being deprived of the use of his property. But under the user principle he is entitled to recover a reasonable rent for the wrongful use of his property by the trespasser. Similarly, the trespasser may not have derived any actual benefit from the use of the property. But under the user principle he is obliged to pay a reasonable rent for the use which he has enjoyed. The principle need not be characterised as exclusively compensatory, or exclusively restitutionary; it combines C elements of both.

**[8]** These are sound principles which have withstood the test of time and have been consistently applied by the courts. And I have no hesitation in applying these principles of law to the facts D of this case. The defendant contends that the rental rate for the premises should be RM4 per sq ft, which is the rate the plaintiff is paying to DBKL, the landlord of the premises. The plaintiff on the other had contended that the "user principle" applies in the context of this case and accordingly the defendant ought to pay E market rates as would be applicable to the premises. I find that there is uncontroverted evidence that the defendant had used the premises to carry out its own business from 1 August 2010 to 17 August 2012. And during this period the plaintiff has been deprived of the use of the premises. Clearly, the defendant had F used the premises for monetary gain.

**[9]** Therefore, this is a clear case for the application of the "user principle" and the defendant is obliged to pay reasonable market rent for the use of the premises. The contention that the rental rate should be RM4 per sq ft cannot stand for the G "measure of damages was not what the plaintiffs had lost, but what benefit the defendant had obtained by having use" of the property. In fact, as stated by Edgar Joseph Jr J in the *Alfred Templeton* case, in situations such as this, "the plaintiff would be entitled to recover more than the market rental value since H recovery would be based upon the benefit which the defendant had extracted from the user" of the premises. The benefit that the defendant has derived from the trespass is that it has not paid any rental at all for the use of the premises. Had it rented the premises from the plaintiff to carry out its business then it would I have had to pay market rental rates and not the rate that the

plaintiff paid DBKL. The measure of damages is not what the plaintiff had lost but rather what gain the defendant had made. It does not matter what rental the plaintiff paid to DBKL. That is entirely an arrangement between the plaintiff and DBKL. In the circumstance, the market rental rate for the premises would be a fair measure of compensation payable to the plaintiff. Therefore, it is now incumbent upon me to decide what is reasonable market rental for the premises.

**[10]** In determining market rental of premises, the comparison method used by property valuers has been consistently accepted by the courts. Both the plaintiff and the defendant have submitted valuation reports. The defendant's valuation report ("DVR") and the plaintiff's valuation report ("PVR") have considered several comparable tenements. I find that two of the comparables in the DVR, that is items 2 and 3 at p. 9, are the same as the comparables used in the PVR. These two properties, ie, Lot (i) and Lot (iii) are the most relevant available comparables as they are adjacent to the right and left of the premises in question. The "Juice Bar" is Lot (ii). All these lots are situated on the "Side Walk Café" on a strip of pavement along busy Jalan Bukit Bintang, Kuala Lumpur.

**[11]** The valuation of market rent for both Lots (i) and (iii) are as follows:

A. As regards Lot (i)

(a) According to the DVR, based on a tenancy period of 1 April 2010 to 30 June 2010, the rental per sq foot is RM17.24; whereas

(b) According to the PVR, based on a tenancy dated 1 April 2011, the rental per sq foot is RM59.52.

B. As regards Lot (iii)

(a) According to the DVR, based on a tenancy period of 1 April 2010 to 30 June 2010, the rental per sq foot is RM33.78; whereas

(b) According to the PVR, based on a tenancy dated 1 April 2011, the rental per sq foot is RM50.68.

**[12]** In considering these comparables, I find that the market rentals ascribed in the PVR are more reflective of the market rentals for the period of assessment, which is from 1 August 2010 to 17 August 2012. This is because, the DVR has taken into account the market rentals of these two properties for the period 1 April 2010 to 30 June 2010, whereas the PVR has referred to a tenancy dated 1 April 2011. The reference date used in the PVR is well within the period of assessment whilst the period of comparison used in the DVR is before the assessment period. Therefore, the comparable rental values stated in the PVR are more reliable for the purposes herein.

**[13]** Considering these range of comparable rental rates contained in the PVR, and that the period of assessment is for 24 months and 16 days, the plaintiff's counsel submits that the rental ought to be assessed on a year to year basis for two separate terms within the period of assessment, ie, from 1 August 2010 to 31 July 2011 ("the first term") and from 1 August 2011 to 17 August 2012 ("the second term"). Counsel further submits that the market rental for the first term be fixed at RM42 per sq foot taking into account the range of RM32 to RM59.52 per sq foot ascribed in the PVR. As to the second term, counsel suggests that the rate be set at RM50 per sq foot taking into account the letting value of the premises being between RM50 to RM75 per sq foot as stated in the PVR.

**[14]** I find that both these suggestions are reasonable in the circumstance and I find that the reasonable market rental for the purposes of calculating damages would be RM42 per sq foot for the first term and RM50 for the second term. Based on the above, the computation of damages would be as follows:

The first term

| | | |
|---|---|---|
| 12 months x (410 sq ft x RM42) | = | RM206,640 |

The second term

| | | |
|---|---|---|
| 12.5 months x (410 sq ft x RM50) | = | RM256,580.65 |
| Total | | RM463,220.65. |

**[15]** The learned Senior Assistant Registrar had used the rate of RM4 per sq ft as the market rental of the premises in assessing damages. I find that the learned Senior Assistant Registrar had erred in applying the rate of RM4 per sq ft as the same is against established principles as discussed above. Therefore, I allowed the appeal as in encl. 63.

**Enclosure 64**

**[16]** There was also a dispute between parties as to the floor area of the "Juice Bar". The plaintiff submitted that the area was 410 sq ft, whilst the defendant submitted that it was 173 sq ft. The learned Senior Assistant Registrar made a finding of fact that the floor area of the "Juice Bar" was 410 sq ft. I find that based on the evidence adduced, that finding of fact by the learned Senior Assistant Registrar is unimpeachable.

**[17]** The plaintiff has tendered the "As Built Survey Plan" of the "Juice Bar" (exh. P2 in plaintiff's affidavit). In this "As Built Survey Plan", the floor area of the "Juice Bar" is measured to be 38.1 sq meter which works out to 410 sq ft. This is further confirmed in the PVR (exh. P3 in plaintiff's affidavit). The defendant submits that the floor area is 173 sq ft based on the DVR. However, a careful perusal of the site plan in the DVR, from where that calculation is made, shows that the area demarcated therein is only a portion of the trespassed area and not the whole, and as such is not an accurate depiction of the trespassed area. Further, the defendant had written a letter dated 10 April 2010 to DBKL seeking confirmation of the dimensions and gross floor area of the "Juice Bar". In that letter, the defendant had attached a site plan, which is similar to the plaintiff's "As Built Survey Plan" (exh. P2). DBKL had replied *vide* letter of 10 May 2010 confirming that the dimensions and area of the "Juice Bar" is as per the plan forwarded by the defendant. In that plan the floor area is 410 sq ft. Therefore, the learned Senior Assistant Registrar was correct in making the finding that the floor area is 410 sq ft. Accordingly, I did not find any merit in the defendant's appeal as contained in encl. 64. Wherefore, I dismissed encl. 64 with cost of RM5,000.